

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

## IN AND FOR NEW CASTLE COUNTY

**EUGENE NOVAK**

Plaintiff

V.

WILLIAM ERSCHEN

Defendant

CIVIL ACTION NUMBER

06C-05-072-JOH

*Submitted: March 26, 2009*

*Decided: May 21, 2009*

**MEMORANDUM OPINION**

*Upon Motion of the Plaintiff for New Trial - DENIED*

*Appearances:*

Joseph J. Longobardi, III, Esquire, of the Longobardi Law Office, Wilmington,  
Delaware, attorney for plaintiff

Donald M. Ransom, Esquire, of Casarino Christman Shalk Ransom & Doss, P.A.,  
Wilmington, Delaware, attorney for defendant

HERLIHY, Judge

Plaintiff Eugene Novak moves for new trial. The jury found he was contributorily negligent but that defendant William Erschen's negligence was greater. However, the jury awarded Novak no damages.

### ***Factual Background***

On May 13, 2004, Novak was driving his large dump truck south of Middletown, Delaware on Delaware Route 71. He was headed southbound intending to make a right turn onto a small side road. On the opposite side of that side road, was a left turn into a housing development.

Route 71 in this area is a two lane road with a wide paved shoulder. A solid white line separates the travel lane from the shoulder. In the area of this matter, that paved shoulder is as wide as the travel lane. To accommodate through traffic, the solid line on the southbound lane becomes a dotted line to allow traffic to lawfully pass on the right. Beyond the turn area, the dotted line reverts back to a solid line.

As Novak drove south he was followed by two cars, neither of them Erschen's. As he approached his right turn, Novak slowed and moved his truck partially into the right lane. Shortly after doing so, Erschen, driving a Jeep Cherokee, hit Novak's large dump truck, while trying to pass him on the right.

The parties made claims of negligence against the other. The jury found both were. It determined Erschen was 60% at fault and Novak 40% at fault. Novak's motion for a new trial does not dispute this finding. He disputes the jury's zero damage award.

Novak testified he felt the impact of Erschen's Cherokee hitting his dump truck, but he did not immediately experience any severe pain as a result. On May 14th, according to some medical records,<sup>1</sup> he felt pain in his low back and neck. He worked on May 17th and 18th and a half day on May 19th. He indicated to Dr. Craig Sternberg, when he saw him on the 20th, that he tried to work through the pain but it became too difficult to do so. Novak is an independent owner/operator and owns his own truck.

He went to the Glasgow Medical Center on May 19th. Because of his complaints, he was given a pain killer, other medications, and a soft cervical collar. On May 20th, he saw Dr. Sternberg. In his initial report of that date,<sup>2</sup> Dr. Sternberg recites Novak's complaints of tightness, tenderness, burning and knotting. His physical examination of Novak revealed some tightness in the cervical paraspinal musculature. His exam of the lumbar area revealed tenderness "with tightness in the paraspinal areas, greater on the left side than the right. Tautness is noted with some spasm being palpated."<sup>3</sup>

Dr. Sternberg's "impression" was:

1. Low back pain, with lumbosacral strain and sprain, with muscle spasm, secondary to a motor vehicle accident.

---

<sup>1</sup> Pl.'s Ex. 4.

<sup>2</sup> *Id.* at Tab 3.

<sup>3</sup> *Id.*

2. Neck pain, with cervical strain and sprain.<sup>4</sup>

Dr. Sternberg directed that Novak not work for the next two weeks. He prescribed therapy, ice and heat for the neck and low back and various medications such as Percocet and Flexoril.

X-rays taken on May 19th, which Dr. Sterberg did not have when he wrote his May 20th report, revealed spondylolysis at C4-C6.<sup>5</sup> Spondylolysis is a degeneration or deficient development of a portion of the vertebra.<sup>6</sup> In addition to the spondylolysis, the x-ray of the lumbar area revealed degenerative changes in the lumbar spine and forward spondylolisthesis at L5-S1 and reversed spondylolisthesis at L4-L5.<sup>7</sup>

In a self-report of July 15, 2004, Dr. Sternberg reports Novak “has only made slow, gradual improvement. Pain level, according to Novak was high who, himself, reported spasms in the low back.” Dr. Sternberg does not report any spasms he found but does report areas Novak reported as tender.<sup>8</sup> Various tests were normal or unremarkable. The “impression” as of July 15th was low back pain, with strain and sprain, secondary to a motor vehicle accident and neck pain with cervical strain and sprain. Dr. Sternberg’s July 15th “impression” does not mention any spasms that he detected.

---

<sup>4</sup> *Id.*

<sup>5</sup> Pl.’s Ex. 4 at Tab 2.

<sup>6</sup> <http://dictionary.webmd.com/terms/spondylolysis>.

<sup>7</sup> Pl.’s Ex. 4 at Tab 2.

<sup>8</sup> Pl.’s Ex. 4 at Tab 3.

Shortly after this visit with Dr. Sternberg, Novak moved to North Carolina. He had, up until his move, continued to drive the truck and work through his neck and low back pain. Novak told the jury he did not want to miss time during his new job in North Carolina and, therefore, did not seek any treatment for a period of time. He saw a doctor in North Carolina in late September 2004. While the visit was for unrelated reasons, there is no mention of neck or back pain or the accident on May 13<sup>th</sup>. Novak was to return to the office on as needed basis.<sup>9</sup> A March 31, 2005 medical record from the same medical practice, indicates Novak returned for a follow up exam. The two conditions noted were hypertension and lumbar disc “disease.”<sup>10</sup> No spasms or other objective findings are noted. Novak was to return in two months.

Meanwhile, in January and February 2005, Novak was receiving physical therapy. He testified it provided temporary relief. There were days, the therapy records show, when he felt fine. However, in late February, he reported feeling worse.

On September 19, 2005, Novak first visited Dr. Robert Rash, a chiropractor in North Carolina.<sup>11</sup> Novak reported pain to Dr. Rash who testified he detected spasm in Novak’s neck and low back. He also detected evidence of joint swelling. According to

---

<sup>9</sup> Pl.’s Ex. 4 at Tab 4.

<sup>10</sup> *Id.*

<sup>11</sup> Initially, prior to trial the Court ruled Dr. Rash was incapable of rendering causation opinions because he was not licensed under Delaware law. 24 *Del. C.* § 717. Dr. Rash undertook the steps to become licensed.

Dr. Rash, the various neck and low back injuries were caused by the accident. He last treated Novak on November 19, 2005, but when he did, Novak still had some pain and stiffness. Novak testified he stopped treating due to lack of funds.

Cross-examination brought out a medical record which Novak filled out for Dr. Rash indicating there were no prior injuries he had suffered.<sup>12</sup> Dr. Rash was, when treating Novak, unaware of records of prior medical history (pre-May 13 accident).

Those prior records included a 1995 MRI of Novak's lower back revealing bilateral spondylolysis at L5.<sup>13</sup> There was another MRI done in May 1996 showing the same condition and a minimal narrowing of the L5-S1 interspace.<sup>14</sup> A June 2000 First State Orthopaedic's report speaks of bilateral osteoarthritis in the hip. Novak, reported to First State Orthopaedic, that his hip issues had been going on for ten years.<sup>15</sup> Another defense exhibit was from April 4, 2005, where a physical therapist in North Carolina reported Novak had returned to work. He had no neck or low back pain complaints and the range of motion for both was within normal limits.<sup>16</sup>

---

<sup>12</sup> Pl.'s Ex. 4 at Tab 6; Def.'s Ex. 6.

<sup>13</sup> Def.'s Ex. 14.

<sup>14</sup> Def.'s Ex. 15.

<sup>15</sup> Def.'s Ex. 16.

<sup>16</sup> Def.'s Ex. 18.

Novak testified he has to work. He takes over-the-counter pain medication. Driving his truck causes pain. He cannot get comfortable sleeping. He does home exercises and uses part of his truck to support stretching exercises when he is not driving.

### ***Parties' Contentions***

Novak argues that the jury's failure to award him damages is against the great weight of the evidence. He cites to the medical records he introduced, the testimony of Dr. Rash, and Erschen's lack of medical testimony to rebut Dr. Rash's conclusions.

Erschen's response is that Novak failed to prove his injuries by a preponderance of the evidence. Erschen devotes the bulk of his argument to criticizing Dr. Rash for not taking into account Novak's prior medical history and only treating Novak for two months. Further, he argues Novak did not disclose his pre-accident medical history to Dr. Rash.

Also, Erschen asserts that Novak's medical history and job history might be the root causes of his symptoms. In addition, while the jury may have found Novak suffered an injury, Erschen contends it was so minor that damages were not appropriate.

### ***Applicable Standard***

A jury's verdict is presumed to be correct.<sup>17</sup> This Court will not set aside a jury's verdict unless it is against the great weight of the evidence.<sup>18</sup> Nor will this Court set aside a verdict unless it is clear that it is the result of a passion, prejudice, partiality or corruption or it is clear the jury disregarded the evidence.<sup>19</sup>

---

<sup>17</sup> *Dunn v. Riley*, 864 A.2d 905, 906 (Del. 2004).

<sup>18</sup> *James v. Glazer*, 570 A.2d 1150, 1156 (Del. 1990).

<sup>19</sup> *Riegel v. Aastad*, 272 A.2d 715 717-18 (Del. 1970).

### *Discussion*

There are two reasons why the jury's zero damage award cannot stand.

First, Dr. Sternberg, a week after this accident, found objective signs of injury. He palpated spasm in Novak's neck and low back. These are quantifiable objective findings deserving of a damages award.<sup>20</sup> The jury ignored this evidence in its failure to award Novak any damages. Nor does Erschen address this evidence in his response to Novak's motion for new trial. Furthermore, a second, interrelated reason exists why the no damage award has to be overturned. Erschen offered no contradictory medical testimony. While mindful Erschen does not have the burden of proof on the damages issue, the Court notes that no expert opined as to the causation of the spasms or Novak's other complaints.

Instead, Erschen relied on several points. One was that Novak had some pre-accident injuries or conditions. But, two, he offered no medical testimony to indicate that any of those pre-existing injuries explained Novak's post-accident injuries or complaints. The jury was left to speculate. In addition, the last pre-accident medical record was four years prior to the accident.

Third, without some supporting medical evidence, he now explicitly argues what was probably an implied argument to the jury: that Novak's years-long truck driving job caused or was a cause of any injury or complaint.

---

<sup>20</sup> *Amalfitano v. Baker*, 794 A.2d 575 (Del. 2001).



Fourth, with some justification, at trial and now, he belittles any injuries which Dr. Rash attributes to the accident. He notes Dr. Rash only treated Novak for two months in late 2005. He points to Dr. Rash first seeing Novak about a year and half following the accident. Fifth, Erschen sought to undermine Novak's credibility and by implication, any opinions Dr. Rash offered based on subjective complaints.

As noted, all of this may be a matter of record, but that argument overlooked the two points noted above: (1) objective symptoms and (2) no contrary medical evidence to properly explain any relationship of prior medical history to post-accident history.<sup>21</sup>

There is, in the Court's view reason to grant additur, even though Novak does not seek it. The Court views additur as more judicially efficient for all involved rather an outright new trial, assuming, of course, Erschen accepts additur. There can be additur even to a zero verdict.<sup>22</sup>

The issue is how much? Some of Erschen's arguments influence the proposed additur. Among those arguments are Dr. Rash's unfamiliarity with Novak's pre-accident history, Novak's answer to the intake form of Dr. Rash's office, the lack of complaints on various occasions, and some inconsistencies in Novak's reporting no pain and reporting pain. Dr. Rash saw Novak within a two month window and for only a few times. He had

---

<sup>21</sup> This latter point highlights the risk defendants in personal injury cases face if they continue to not present contrary medical evidence and rely solely on seeking to inject issues of credibility.

<sup>22</sup> *Hall v. Dorsey*, 1998 WL 960774 (Del. Super. Nov. 5, 1998)

not seen Novak for about three and a half years (as of the trial date). According to Dr. Sternberg's records the spasms noted shortly after the accident did not last more than a few weeks. But Novak's pain complaints then and for a reasonable time after the accident were consistent with the areas of spasm.

With all three in mind, the Court finds an additur of \$15,500.00 is appropriate. Erschen will have ten (10) days from the date of this opinion to accept or reject this award. If he rejects it, a new trial on issues is granted so as to keep the injuries claimed and the circumstance of the accident before a new jury. If Erschen accepts the additur, the zero verdict will be set aside, and the Court will reduce it reflecting the 40% finding of contributory negligence.

The motion for new trial is, at the moment, DENIED, subject to the above.

**IT IS SO ORDERED.**

---

J.